



DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 21

RIN 2900–AP72

Veterans Employment Pay for Success Grant Program

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) established a grant program (Veterans Employment Pay for Success (VEPFS)) to award grants to eligible entities to fund projects that are successful in accomplishing employment rehabilitation for Veterans with service-connected disabilities. VA will award grants on the basis of an eligible entity's proposed use of a Pay for Success (PFS) strategy to achieve goals. This final rule adopts with changes an interim final rule that established regulations for awarding a VEPFS grant, including the general process for awarding the grant, criteria and parameters for evaluating grant applications, priorities related to the award of a grant, and general requirements and guidance for administering a VEPFS grant program.

DATES: This rule is effective on [insert date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Mike Frueh, Deputy Assistant Secretary, Planning and Performance Management, (008A), Department of Veterans Affairs, 810

Vermont Ave. NW., Washington, DC, (202) 632-8784. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: Section 3119 of title 38, United States Code, authorizes the Secretary of Veterans Affairs (Secretary) to make grants to or contract with public or nonprofit agencies, including institutions of higher learning, to advance “the knowledge, methods, techniques, and resources available for use in rehabilitation programs for veterans.” Section 3119 specifically authorizes the Secretary to make grants to such agencies to conduct or provide support for projects which are “designed to increase the resources and potential for accomplishing the rehabilitation of disabled veterans.” (See also implementing regulation at 38 CFR 21.390.)

On August 10, 2016, VA published an interim final rule in the Federal Register, 81 FR 52770, under the authority of sec. 3119 establishing regulations for administering a VEPFS grant program to award grants to eligible entities to fund projects that are successful in accomplishing employment rehabilitation for Veterans with service-connected disabilities. In general, a PFS model is a strategy for successfully attaining positive social or environmental outcomes by paying for an intervention to achieve such outcomes only after the intervention produces these outcomes. The interim final rule included the general process for awarding the grant, criteria and parameters for evaluating grant applications, priorities related to the award of a grant, and general requirements and guidance for administering a VEPFS grant program. VA provided a 60-day public comment period that ended on October 11, 2016, and received nine comments from a single entity.

The first comment recommended amending the definition of “Employment

outcome” to include outcomes that occur “during” as well as following the service period so that the PFS agreement reflects the benefits of the selected intervention while services are provided. In addition, this comment and the third comment recommended amending the definitions of “Employment outcome” and “Outcomes payments” to allow a PFS project evaluation to be based on a “comparison” group in addition to a “control” group so there is greater flexibility when structuring valid evaluation methodologies. VA agrees that if employment outcomes can be measured during the service period, an evaluator may be able to obtain useful information that could assist with determining whether employment outcomes have improved across the lifecycle of the project. It is feasible to assume that some outcomes may be achievable and measurable at any point during the lifecycle of the service period. VA believes measuring outcomes during the service period may allow for greater flexibility in transaction structuring for outcomes payments. In addition, VA agrees that basing a project evaluation on a comparison group or a control group will allow for greater flexibility in structuring evaluation methodologies. Having greater flexibility in this regard may allow for greater statistical power when measuring outcomes and benefit the VA program office when evaluating the impact of the outcomes on future rehabilitation policy and programming. Therefore, we are amending the definition of “Employment outcome” to reflect that it means the employment or earnings of a participant in an intervention group or a control or comparison group either during or after a service period. We are further amending this definition and the definition of “Outcomes payments” to indicate that comparison groups, in addition to control groups, may be used when structuring evaluation methodologies.

The second comment proposed adding a definition of “Outcome metrics” and

additional comments, including the sixth comment, recommended adding the language, “outcomes metrics or” before “target levels” in a number of the regulatory sections in this rulemaking. “Outcomes metrics or target levels” as a phrase does not make sense. Outcomes are a kind of result of interventional or non-interventional activities. Targets are a hoped-for level of achievement for various outcomes, or a characteristic of outcomes, and are not part of an “either/or” option. Therefore, we will not add the language “outcomes metrics or” to any of the regulatory provisions in this rulemaking. Because we are not adding this proposed language, there is no need to add a definition for “Outcome metrics.”

The fourth comment recommended clarifying that the project partnership may be memorialized in more than one agreement. We are amending the definition of project partnership to reflect that it may consist of multiple agreements because allowing for multiple agreements will provide the project partnership with greater flexibility.

The fifth comment recommended allowing each VEPFS grant to establish the minimum and maximum number of years rather than requiring a minimum 5-year period for all VEPFS grants. VA’s original vision for pay for success programming did not account for projects that may have a shorter duration, such as feasibility studies or studies that may require long-term evaluation of certain employment outcomes. To accommodate a broader range of PFS projects with the increased potential for better outcomes, VA agrees that performance period minimums or maximums should be established on a per grant program basis. Thus, we are amending § 21.442(c) to allow each VEPFS grant agreement to establish the project duration instead of setting a required minimum period.

The seventh comment proposed to eliminate the requirement that grantees procure investors in a government acquisition process following procurement standards set forth in 2 CFR 200.317-200.326. The commenter explained that, in typical PFS arrangements to which it has been a party, investors are not “procured” and are not a party to the PFS agreement. Typically, the government is not a party to the investor financing agreements and does not negotiate directly with investors. The commenter explained that investors do not provide services to the government, but fund services to be provided by the service provider and bear the risk that the intervention will not achieve the agreed upon outcomes metrics. Thus, investors are recruited or engaged in a manner that befits their role as risk-bearing entities in the PFS model.

We agree to eliminate the requirement that grant recipients “procure” investors and follow procurement standards set forth in 2 CFR 200.317-200.326. Although the uniform grant regulations at 2 CFR part 200 apply to recipients (and subrecipients) of the PFS grants, they do not contemplate investors as playing a part in the grant agreement or carrying out the purposes of the grant. The procurement of goods and services by way of contract is a key factor in creating a procurement relationship. See 2 CFR 200.330(b). The Federal Acquisition Regulations defining “procurement” and “acquisition” support the position that investors and investments of capital are not “procured.” As the commenter explained, because investors supply money/funding, and do not provide goods or services, obtaining investments is not an acquisition or procurement as contemplated by the uniform grant regulations. While the funding investors provide is used to procure goods or services necessary to carry out the grant’s purpose, neither the investor nor the funding is a good or service that is procured.

Therefore, the uniform grant regulations at 2 CFR part 200 should not apply, and we agree to exclude “investors” from the requirement in § 21.445(b) that partner entities be procured following procurement standards set forth in 2 CFR 200.317-200.326.

The eighth comment proposed to not require grantees to identify investors at the time of application. We see no reason why grantees should not be able to identify investors at the time of application and the commenter has provided no convincing reason. We do not believe that excluding investors from the procurement requirement supports the argument that investors should be identified later in the grant process. Furthermore, identifying investors later in the process would introduce uncertainty into the overall viability of the applicant’s proposed project. Accordingly, we will not make any changes based on this comment.

The ninth comment proposed to allow VA and an applicant to negotiate a cooperative agreement or a grant agreement to provide flexibility in finalizing the terms of the VEPFS grant. As stated above, sec. 3119 provides the authority for the Secretary to make these VEPFS grants. It also provides authority for the Secretary to contract with entities to fund projects that are successful in accomplishing rehabilitation for Veterans with service-connected disabilities. However, there is no authority for the Secretary to enter into cooperative agreements to fund such projects. As VA has no authority to enter cooperative agreements for this purpose, we must decline to change the regulations to allow for the negotiation of cooperative agreements between an applicant and VA.

Based on the rationale set forth in the interim final rule and in this document, VA

is adopting the provisions of the interim final rule as a final rule with changes, as noted above.

Administrative Procedure Act

The Secretary is issuing this rule because there is a need to find new methods for rehabilitating Veterans with service-connected disabilities to become employable and obtain and maintain suitable employment. This rulemaking serves an important Veterans' need in an economical way because it provides the opportunity for discovering such new methods using a strategy that will save taxpayer money. However, funding for a grant awarded under these regulations was available to be obligated within a limited timeframe. Therefore, it was impracticable and contrary to the public interest to delay the rule for the purpose of soliciting advance public comment or to have a delayed effective date. Accordingly, VA issued an interim final rule with an immediate effective date and is now issuing this final rule after having considered the comments submitted.

Executive Orders 12866, 13563 and 13771

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing

costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs has determined that this rule is not a significant regulatory action under Executive Order 12866.

VA's impact analysis can be found as a supporting document at <http://www.regulations.gov>, usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's website at <http://www.va.gov/orpm/>, by following the link for "VA Regulations Published From FY 2004 Through Fiscal Year to Date."

This final rule is considered an EO 13771 regulatory action. Details on the estimated costs of this final rule can be found in the rule's economic analysis.

Paperwork Reduction Act

Although this action contains provisions constituting collections of information at 38 CFR 21.445, 21.447, and 21.448, under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521), no new or proposed revised collections of information are associated with this final rule. The information collection requirements for §§ 21.445, 21.447, and 21.448 are currently approved by OMB and have been assigned OMB control number 2900-0847.

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the

Regulatory Flexibility Act (5 U.S.C. 601-612). The Secretary estimates that, for any VEPFS grant program, no more than ten non-renewable grants will be awarded. For each grant awarded, usually one of each, but no more than a few, outcomes payors, project coordinators, evaluators, investors, and service providers will be involved with the grant program. The goal of these grants is to rehabilitate Veterans with service-connected disabilities with regard to employment. Thus, an insubstantial number of small entities will be affected by this final rule and, accordingly, there will not be a significant economic impact on such affected entities. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This final rule will have no such effect on State, local, and tribal governments, or on the private sector.

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined

by 5 U.S.C. 804(2).

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance number and title for the program affected by this document is 64.116, Vocational Rehabilitation for Disabled Veterans.

List of Subjects in 38 CFR Part 21

Administrative practice and procedure, Armed forces, Civil rights, Claims, Colleges and universities, Conflict of interests, Defense Department, Education, Employment, Grant programs—education, Grant programs—veterans, Health care, Loan programs—education, Loan programs—veterans, Manpower training programs, Reporting and recordkeeping requirements, Schools, Travel and transportation expenses, Veterans, Vocational education, Vocational rehabilitation.

Signing Authority

The Secretary of Veterans Affairs approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Pamela Powers, Chief of Staff, Performing the Delegable Duties of the Deputy Secretary, Department of Veterans Affairs, approved this document on April 13, 2020, for publication.

Jeffrey M. Martin,
*Assistant Director,
Office of Regulation Policy & Management,
Office of the Secretary,
Department of Veterans Affairs.*

Accordingly, the interim final rule amending 38 CFR part 21, which published at 81 FR 52770 on August 10, 2016, is adopted as final with the following changes:

PART 21—VOCATIONAL REHABILITATION AND EDUCATION

Subpart A—Vocational Rehabilitation and Employment Under 38 U.S.C. Chapter 31

1. The authority citation for part 21, subpart A, continues to read as follows:

Authority: 38 U.S.C. 501(a), chs. 18, 31, and as noted in specific sections.

2. In § 21.441, revise the definitions of “Employment outcome” and “Outcomes payments” and the introductory text of the definition of “Project partnership” to read as follows:

§ 21.441 Definitions.

* * * * *

Employment outcome is the employment or earnings of a participant in an intervention group or control or comparison group during or after the service period. Improving employment outcomes means creating positive impact in terms of these outcomes, where the results for individuals that receive the intervention are better than the results for a valid control or comparison group that did not receive the intervention.

* * * * *

Outcomes payments are funds that are paid to an investor or service provider and that are released only for the achievement of outcomes, as compared to those of a control or comparison group, that meet target levels that have been agreed to in advance of the

provision of intervention (i.e., if positive impact has been created by the intervention in terms of these outcomes). When investors have provided the upfront capital for the project, these payments generally cover repayment of the principal investment and provide a modest return on investment for any associated risks of paying for the intervention upfront.

* * * * *

Project partnership is a collaboration among entities that negotiate one or more agreements and execute a project to improve employment outcomes for Veterans with service-connected disabilities. The entities that may be involved in a project partnership include:

* * * * *

3. In § 21.442, revise paragraph (c) to read as follows:

§ 21.442 VEPFS grants—general.

* * * * *

(c) A VEPFS grant will be awarded for a minimum and maximum number of years that is specified in the VEPFS grant agreement, beginning on the date on which the VEPFS grant is awarded, with the availability of no-cost extensions.

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4. In § 21.445, revise paragraph (b) to read as follows:

§ 21.445 Application.

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(b) Description of anticipated project partnership(s), including the responsibilities of each of the partner entities, the experience of any involved entities with serving Veteran populations, and other qualifications of the involved entities that may be relevant in carrying out responsibilities of the project partnership. In establishing the project partnership, entities, including the project coordinator, evaluator, and service provider, but excluding investors, must be procured following procurement standards set forth in 2 CFR 200.317 through 200.326.

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